

01311

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-186195

DATE: November 17, 1976

MATTER OF:

Action Manufacturing Company--Reconsideration
MBAssociates

DIGEST:

1. Request for reconsideration is denied, since it does not show that prior decision was based on error of law or fact.
2. As result of GAO decision, protester became low bidder and apparent low bidder became second low. Subsequent protest by resultant second low bidder concerning responsiveness of resultant low bid, filed within 10 working days after receipt of referenced GAO decision, is timely since, until that decision, there was no reason to file such protest.
3. IFB required prices on page 17 for items 0001AC and 0001AB, latter subject to first article approval, and unit and total contract price if approval requirement were waived. Bidder inserted prices for both items on page 17 and inserted only reduced price on page 16 for item 0001AB. Bid is considered responsive, since IFB reasonably contemplated that only price for item subject to approval be reduced if requirement were waived, and "total contract price" with waiver can be derived by addition of item 0001AC price on page 17 and item 0001AB price on page 16.
4. Considering as responsive bid that failed to provide "total contract price" as required by IFB but included sufficient information to derive omitted price by application of generally accepted mathematical formula does not render IFB ambiguous "as applied."

MBAssociates (MBA) requests that we reconsider our decision, Action Manufacturing Company, B-186195, July 23, 1976, 76-2 CPD 73, in which we sustained the protest of Action Manufacturing Company (Action) against the proposed award of a contract to MBA by the United States Army Armament Command under invitation for bids (IFB) No. DAAA09-76-B-0012.

The IFB solicited bids to furnish warheads for the TOW missile, and required bid prices for items 0001AB ("Warhead") and 0001AC ("Warhead, less Nose Crush Switch Assy."). A first article sample requirement applied to item 0001AB only. On the schedule of prices on page 17, MBA quoted a unit price of \$36.63 for item 0001AB, and a unit price of \$18.85 for item 0001AC. On page 16, where bidders were to indicate a price which would become effective if the first article sample requirement were waived, MBA inserted the same unit price for item 0001AB, and inserted a unit price of \$17.85 for item 0001AC.

In our decision, we concluded that MBA's bid price of \$17.85 for item 0001AC on page 16 could not be considered in the evaluation of bids for award. We stated that, although the contracting officer surmised that MBA must have meant the \$18.85 figure on page 17 to apply only if a first article sample were required for item 0001AC, the fact remained that no first article sample requirement existed for that item. It was, therefore, our belief that the most reasonable interpretation of MBA's bid price of \$18.85 was that \$18.85 was the intended bid price for item 0001AC without a first article sample for that item. We further stated that, in the alternative, it was at the most unclear from MBA's bid which of the two bid prices for item 0001AC would govern in the event of an award to it. In concluding that MBA's bid must, therefore, be evaluated on the basis of the higher bid price, we stated the following:

"* * * where, as here, a bid contains two or more conflicting prices, the bidder may not be permitted to choose after bid opening which price should govern the evaluation of its bid. See Rix Industries, B-184603, March 31, 1976, 76-1 CPD 210, wherein an agency correctly evaluated a bid containing conflicting prices on the basis of the higher prices * * *."

In its request for reconsideration, MBA argues that we failed to consider the direction on page 16 of the IFB that "Offeror will indicate below by item and unit a total contract price which will prevail should the Government exercise its right to waive first article approval requirement." (Emphasis added). MBA contends:

"* * * Only by the indication at page 16 itself (not page 17) of a total contract price could a bidder be responsive to IFB DAAA09-76-B-0012. It is submitted that the United States Comptroller General, contrary to the determination of the

procurement agency, had no authority to pick and choose prices between page 16 and page 17 contrary to the express words of IFB DAAA09-76-B-0012. Total contract price was bid by MBA without first article 'approval' at page 16 and with first article 'sample' at page 17. Let the United States Comptroller General choose either the total contract price bid at page 16 or the total contract price bid on page 17 but not a hodge podge of prices 'intended' for the MBA bid * * *."

MBA also argues that the solicitation and the facts in Rix Industries, supra, cited in the July 23 decision, can be distinguished from those involved in the Action protest and the cited case is, therefore, inapplicable to consideration of MBA's bid.

MBA's first contention is essentially another argument in support of its position as taken in the Action protest. It cannot, therefore, be a basis for reconsideration of our June 23 decision. See Life Industries, Inc.--Reconsideration, B-184403, July 29, 1976, 76-2 CPD 91; Particle Data, Inc., B-178718, May 29, 1974, 74-1 CPD 288. Concerning MBA's second point, Rix Industries, supra, was clearly cited not because its facts were presumed identical to those then before us, but rather as basic source material supporting the indicated position consistently taken by this Office and clearly relevant to the consideration of MBA's bid.

Accordingly, and since the request for reconsideration does not demonstrate any error of law or fact, our decision of July 23 is affirmed. See Reconsideration of Decision - Acurex Corporation, B-183275, February 5, 1976, 76-1 CPD 72; Particle Data, Inc., supra.

In addition to the request for reconsideration, MBA has filed a protest with our Office concerning the same procurement in which it contends that Action's bid was not responsive to the IFB and was ambiguous, and that the Government's acceptance of the bid under those circumstances renders the solicitation ambiguous "as applied."

As noted above, the IFB required bidders to insert on page 17 unit and total prices for items 0001AB and 0001AC. Action inserted a unit price of \$35.45 and a total price of \$822,829.95 for item 0001AB, and a unit price of \$28.50 and a total price of \$99,750.00 for item 0001AC.

On page 16, bidders were directed as follows:

"Offerors will indicate below by item a unit and total contract price which will prevail should the Government exercise its right to waive the first article approval requirement."

Directly beneath that instruction were three column headings under which Action bid as indicated below:

<u>ITEM NO.</u>	<u>UNIT PRICE</u>	<u>TOTAL AMOUNT</u>
0001AB	\$35.15 x 23,211	\$815,866.65

MBA contends that Action's failure to insert in that space under the column headings on page 16 a unit price for all items for which the IFB required bid prices, and to insert a "total contract price" as instructed, were material deviations from the terms of the solicitation and rendered the bid nonresponsive. MBA contends that " * * * an award cannot be made to ACTION * * * in excess of the price indicated * * * at page 16 of the IFB * * * \$815,866.15."

MBA also sets forth a related argument, contending that Action's bid is ambiguous. MBA argues:

" * * * the ACTION bid * * * is subject to two or more reasonable interpretations:

- [1] "ACTION could insist * * * that ARCOM make an award to ACTION of Item 0001AB alone at a total contract price of \$815,866.15 * * *
- [2] "ACTION could insist that ARCOM make an award to ACTION of both Item 0001AB and Item 0001AC at the total contract price of \$815,866.15 on the basis that there is no charge for Item 0001AC.
- [3] "ACTION could insist, as it does now, with full visibility of the competitive bid prices, that it be awarded a total contract price of \$915,616.65, consisting of the unit price for Item 0001AB in the sum of \$815,166.15 indicated at * * * page 16 * * * plus the price for Item 0001AC in the sum of \$99,750.00, indicated at * * * page 17 * * *

[4] "ACTION could insist that it inadvertently or by mistake failed to comply with paragraph 2, page 16 of the IFB in that it failed to indicate a 'total contract price' and/or 'unit' price for 'item' 0001AC and therefore, insist that its bid be withdrawn.

"The least that may be said is that the ACTION bid between paragraph 2 and paragraph 3, page 16 of the IFB, is uncertain and indefinite whether that bid was made through inadvertence or mistake or otherwise * * *."

Finally, MBA argues that if Action's failure to follow the express direction on page 16 does not render the bid nonresponsive, the solicitation, as stated above, must be considered ambiguous "as applied."

Action contends that its total bid price is "clearly and readily ascertainable" from its bid. Action argues that its total bid price without first article sample approval is \$915,616.65, which is the sum of \$815,866.65 bid for item 0001AB on page 16 without first article sample approval, and \$99,750.00, bid on page 17 for item 0001AC, which was not subject to first article sample approval.

In addition to contesting the merits of MBA's protest, Action argues that MBA's protest was not timely filed in this Office. In this connection, section 20.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. § 20.2 (1976), provides in part:

"* * * bid protests shall be filed not later than 10 [working] days after the basis for the protest is known or should have been known, whichever is earlier."

Action contends that MBA's protest to GAO should have been filed within 10 working days after bid opening, when Action's bid was made available to all bidders.

In regard to the timeliness of the filing of MBA's protest in our Office, we believe that MBA had 10 working days from receipt of our July 23 decision sustaining Action's protest, and effectively moving MBA's bid from low to second low, in which to file its protest. Until that time, MBA was the apparent low bidder, and the Army's position on Action's protest was favorable to MBA. Thus, until we resolved Action's protest, MBA had no reason to file a protest with our Office concerning any other bid. Moreover, we

believe that Action's position would place an undue burden upon bidders whose bids are challenged to, essentially, file "defensive" protests against all challenging bidders. In view of these circumstances, MBA's protest to our Office against consideration of Action's bid, filed within 10 working days after receipt of our July decision, was filed in a timely manner.

Proceeding to the merits of the protest, as stated in our discussion of MBA's request for reconsideration a first article sample was required for item 0001AB but not for item 0001AC. Accordingly, and as implied in our July 23 decision, the only change in an item bid price if first article sample approval were waived that could reasonably have been contemplated on page 16 was a reduction of the bid price for item 0001AB. Thus, unless a bidder indicated otherwise, the bid price entered on page 17 for item 0001AC would apply with or without first article sample approval for item 0001AB. A bidder's failure to insert a unit or total price for any item other than item 0001AB on page 16 would not, therefore, affect the responsiveness of its bid.

Further, in regard to MBA's argument concerning insertion of a "total contract price" on page 16, a bid may be found responsive even where a bidder fails to furnish data called for if sufficient information has been included with the bid to derive the omitted data by application of generally accepted mathematical formulas. See Publication Press, Inc., B-186461, August 26, 1976, 76-2 CPD 190. Accordingly, and even assuming that bidders were required to insert on page 16 a "total contract price" for all items even though the only expected change was in the bid price for item 0001AB, Action's bid would be considered responsive on the basis of a simple addition of the "amount" figure on page 16 and the "amount" figure on page 17, as argued by Action. Moreover, we believe that to be the only reasonable interpretation of Action's bid as it appeared at bid opening and that the bid is not, therefore, ambiguous. In this connection, and notwithstanding MBA's contention that Action could at some future time "insist" on one of a number of interpretations of its bid, the responsiveness of a bid is determined from the face of the bid itself at bid opening, see James and Stritzke Construction Company, 54 Comp. Gen. 159 (1974), 74-2 CPD 128, and the Government's acceptance of a responsive bid effectively binds the bidder to perform in accordance with the advertised terms of the solicitation. See 52 Comp. Gen. 955 (1973).


Finally, in view of regulations and decisions providing for waiver of minor deviations in bids (see, for example, Armed Services Procurement Regulation § 2-405 (1975 ed.); Bid Protest - Chemical Technology Inc., B-187674, April 2, 1974, 74-1 CPD 167); that bids

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are to be reasonably interpreted notwithstanding a protester's allegation of ambiguity (see, for example, Teledyne Walterboro, B-186051, July 9, 1976, 76-2 CPD 28); and similar principles for consideration in bid evaluation, we cannot agree with MBA that holding responsive a bid that may not comply precisely with the terms of a solicitation necessarily renders that solicitation ambiguous "as applied."

Based on the above, Action's bid was responsive to the solicitation and Action is eligible for award for both items 0001AB and 0001AC at the bid price of \$915,616.65 without first article sample approval. The protest is denied.

Deputy


Comptroller General
of the United States